

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

<b>In the Matter of</b>	)	<b>DA 03-2952</b>
	)	
<b>VONAGE HOLDINGS</b>	)	
<b>CORPORATION</b>	)	<b>WC Docket No. 03-211</b>
	)	
<b>Petition for Declaratory Ruling</b>	)	
<b>Concerning an Order of the</b>	)	
<b>Minnesota Public Utilities Commission</b>	)	

**COMMENTS OF THE  
MINNESOTA OFFICE OF THE ATTORNEY GENERAL**

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## TABLE OF CONTENTS

<u>INTRODUCTION</u> .....	4
<u>I. THE ISSUES RAISED IN VONAGE’S PETITION FOR A DECLARATORY RULING ARE BEST CONSIDERED AS PART OF A MORE COMPREHENSIVE GENERIC PROCEEDING.</u> .....	5
<u>II. IF THE FCC DECIDES TO MAKE A DETERMINATION REGARDING VONAGE’S PETITION BEFORE COMPLETING A BROADER PROCEEDING REGARDING VOIP SERVICE, THE COMMISSION SHOULD DENY VONAGE’S REQUEST THAT THE FCC PREEMPT THE MINNESOTA COMMISSION ORDER.</u> .....	7
<u>A. Vonage’s VoIP Service Is A Telecommunications Service Within The Meaning Of The Act.</u> .....	8
<u>B. Congress Has Not Preempted The MPUC From Regulating Vonage’s VoIP Service To Ensure Quality Of Service And Safeguard The Rights Of Consumers.</u> .....	9
<u>CONCLUSION</u> .....	12

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**COMMENTS OF THE MINNESOTA  
ATTORNEY GENERAL**

The Minnesota Office of the Attorney General (“OAG”) respectfully submits these comments in the above-captioned proceeding.

On September 22, 2003, Vonage Holdings Corporation (“Vonage”) filed a petition with the Federal Communications Commission (“FCC”) requesting that the FCC preempt a recent order of the Minnesota Public Utilities Commission (“MPUC”) holding that Vonage provides telephone service within the meaning of state law and is therefore subject to the state requirements relating to 911, as well as other requirements applicable to providers of telephone service. The OAG recommends that the FCC defer a decision based on Vonage’s request until the FCC has addressed the numerous important policy issues surrounding Voice over Internet Protocol (“VoIP”) service in a broader proceeding. The FCC has indicated that it plans to open such a proceeding as early as this fall. The OAG believes that deferring a decision in this matter until that more general proceeding is completed will ensure a fair, consistent, and thoughtful decision in both proceedings.

## INTRODUCTION

Minnesota Statutes § 8.33 establishes that the Attorney General of the State of Minnesota is responsible for representing and furthering the interests of Minnesota residential and small business utility consumers. Minnesota Statutes § 8.33, subd. 2 states:

The attorney general shall expend a reasonable portion of effort among all three kinds of utility services and shall identify and promote the needs of each class of residential and small business consumers with respect to each of the utility services. When participating in telecommunication matters that affect deployment of the infrastructure, the attorney general may apply the goals of:

- (1) achieving economically efficient investment in:
  - (i) higher speed telecommunication services; and
  - (ii) greater capacity for voice, video, and data transmission; and
- (2) just and reasonable rates.

(2002) It is in this capacity as the representative of the interest Minnesota's small business and residential utility consumers that the OAG submits the following comments.

Bearing in mind its statutory duty to apply the goal of furthering investment and seeking greater capacity for voice and data transmission, the OAG acknowledges at the onset some of the benefits Minnesota consumers are finding with Vonage's VoIP services. At present, Vonage has approximately 500 customers with billing addresses in Minnesota.<sup>1</sup> Customers are responding in increasing numbers to Vonage's advertisements concerning its free features and lower local and long distance rates for unlimited calling that avoid many of the line-item charges seen with

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<sup>1</sup> *Vonage Holdings Corporation v. the Minnesota Public Utilities Commission, and Leroy Koppendray, Gregory Scott, Phyllis Reha, and R. Marshall Johnson, in their official capacities as the commissioners of the Minnesota Public Utilities Commission and not as individuals*, Civil No. 03-5287, United States District Court (District of Minnesota), Memorandum and Order, October 16, 2003 at 4.

traditional voice service. The OAG in no way advocates that this technology, with its various applications and benefits to consumers, should be curtailed or stifled by inappropriate regulation. However, Vonage's success with its current advertising campaign, which markets itself as a phone service or alternative to phone service, gives rise to serious public safety concerns that must be meaningfully addressed.

Though Vonage advocates that it is providing an information service which states are preempted from regulating, its advertisements and own website clearly tout its service as a telephone service.<sup>2</sup> Advertising as a telephone service is problematic because consumers identify telephone service as including a reliable connection with 911 emergency response centers with personnel trained to locate and respond to the consumer. Thus, if Vonage wants to advertise and hold itself out as a phone company, the OAG feels it necessary to deal with consumers' reasonable expectations concerning their service and the public safety concerns posed by Vonage's current 911 system.

**I. THE ISSUES RAISED IN VONAGE'S PETITION FOR A DECLARATORY RULING ARE BEST CONSIDERED AS PART OF A MORE COMPREHENSIVE GENERIC PROCEEDING.**

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<sup>2</sup> Vonage has included information on its own web site with representations such as "Vonage DigitalVoice is an all-inclusive home phone service that replaces your current phone company. This is like the home phone service you have today--only better!" (taken from Vonage's web site at [http://www.vonage.com/learn\\_tour.php](http://www.vonage.com/learn_tour.php)). TV and radio work from New York shop the Gardner-Nelson project portrays Vonage as the rallying point for a grassroots movement against traditional phone companies. In one TV spot fashioned in 30-second, 60-second, and 1:20 versions, shop owners post signs in their windows that read, "Down with high phone bills, switch to Vonage." People are shown supporting the company with signs, and kids hold signs in their yards. The ad ends with onscreen text: "Vonage. The broadband phone company." Deanna Zammit, Vonage Starts Rallying Cry for Broadband Phones: Launches Effort as Big, Adweek (October 13, 2003).

In its Petition for a Declaratory Ruling (“Petition”), Vonage requests that the FCC issue a finding that the State of Minnesota is preempted from regulating Vonage as an intrastate telephone company because Vonage is a provider of information services and state regulation of these services would conflict with the national policy of promoting unregulated competition in the Internet and information services market, as recognized in 47 U.S.C. § 230(b)(2).<sup>3</sup> Vonage also seeks a ruling that Minnesota’s Enhanced 911, or E911, requirements are in conflict with federal policies and should be preempted.

The OAG believes that Vonage’s requests are best considered as part of a more comprehensive generic proceeding rather than through a declaratory ruling. Commissioner Powell has indicated that the FCC plans to initiate such a proceeding to consider regulation of VoIP services as early as this fall. Such a proceeding will provide a much more complete record than the limited record concerning VoIP currently before the FCC, and allow the FCC to consider the broader range of issues concerning regulation of VoIP services.

The FCC currently has other open dockets concerning issues related to VoIP services.<sup>4</sup> These dockets touch on the numerous issues emerging as VoIP service evolves and becomes

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<sup>3</sup> Petition at 31.

<sup>4</sup> In another proceeding, AT&T has petitioned the Commission to declare phone-to-phone VoIP exempted from access charges. *In the Matter of AT&T’s Petition for Declaratory Ruling Concerning Phone-to-Phone IP Telephony*, WC Docket No. 03-211. Further, the Department of Justice and Federal Bureau of Investigation have filed comments in an ongoing VoIP docket concerning regulatory treatment and its impact on their ability to implement the Communications Assistance for Law Enforcement Act (CALEA), 47 U.S.C. § 1001 *et seq.* See Comments of the Department of Justice and Federal Bureau of Investigation, *Petition for Declaratory Ruling that pulver.com’s Free WorldDialup Service is neither Telecommunications nor a Telecommunications Service*, (WC Docket No. 03-45).

more prevalent. These issues include: state E911 requirements, determination of intrastate and interstate traffic, access charges, state and federal high cost fund issues, and issues related to compliance with the Communications Assistance for Law Enforcement Act of 1994. It is appropriate to consider all of these important issues in determining the appropriate level of regulation for VoIP service. It is further appropriate to consider these issues in the context of a generic proceeding addressing VoIP service more broadly than focusing on the offering of a single VoIP provider, Vonage, and the regulations sought to be imposed by a single state, Minnesota. Therefore, the OAG urges the FCC to develop a record and undertake a comprehensive examination of the interrelated issues to ensure consumers are protected and receive the benefits of the new technology, rather than directly acting on the company's petition.

**II. IF THE FCC DECIDES TO MAKE A DETERMINATION REGARDING VONAGE'S PETITION BEFORE COMPLETING A BROADER PROCEEDING REGARDING VOIP SERVICE, THE COMMISSION SHOULD DENY VONAGE'S REQUEST THAT THE FCC PREEMPT THE MINNESOTA COMMISSION ORDER.**

In the event that the FCC does not defer a decision on Vonage's petition until after completing a generic proceeding regarding VoIP, the OAG requests that the FCC *deny* Vonage's request to preempt the Order of the MPUC. A functional analysis shows that the VoIP service provided by Vonage is a telecommunications service within the meaning of the Telecommunications Act of 1996 ("Act").<sup>5</sup> Furthermore, the Act specifically preserves the authority of states to regulate telecommunications services on a competitively neutral basis to

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<sup>5</sup> 47 U.S.C. §153(51).

protect public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.<sup>6</sup>

**A. Vonage's VoIP Service Is A Telecommunications Service Within The Meaning Of The Act.**

The FCC has stated previously that a functional analysis is the proper method for determining whether to categorize a service as a telecommunications service. The FCC has specifically stated:

We believe the statute and precedent suggest a functional approach, focusing on the nature of the service provided to customers, rather than one that focuses on the technical attributes of the underlying architecture.<sup>7</sup>

Applying such a functional analysis to Vonage's VoIP service demonstrates that Vonage's service is a telecommunications service. Customers receive telephone numbers, communicate using their regular telephones, make and receive voice calls, and understand that the message they relay as a caller is identical to the message heard by the recipient, with no real change during the transmission. Moreover, the service is marketed as phone service or as a substitute for phone service. From the customer's perspective, there is no functional difference between service provided solely over the public switched network and Vonage's VoIP service.

Further, as the Minnesota Public Utilities Commission noted in its Response to Vonage's Motion for a Preliminary Injunction in Minnesota district court, the FCC specifically addressed VoIP services in its 1998 Report to Congress.<sup>8</sup> That Report to Congress, while acknowledging

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<sup>6</sup> 47 U.S.C. §253(b).

<sup>7</sup> CC Docket Nos. 02-33, 95-20, 98-10, rel. Feb. 15, 2002, para. 7.

<sup>8</sup> *In the Matter of Federal-State Joint Board on Universal Service* (Report to Congress) CC Docket No. 96-45 (April 10, 1998), ¶¶ 89-91.



the need to create a more complete record based on individual service offerings, states that the record before the FCC suggested that this type of telephony lacked the characteristics that would render it an “information service” within the meaning of the statute and instead bears the characteristics of telecommunications service.<sup>9</sup>

**B. Congress Has Not Preempted The MPUC From Regulating Vonage’s VoIP Service To Ensure Quality Of Service And Safeguard The Rights Of Consumers.**

Federal law does not prohibit the MPUC from using its authority under state law to address public safety concerns and otherwise regulate Vonage’s VoIP service to ensure quality service and safeguard the rights of consumers. Section 253(b) of the Act expressly allows states to impose, on a competitively neutral basis, requirements necessary to protect the public safety and welfare, to ensure the continued quality of telecommunications services, and to safeguard the rights of consumers. Congress did not broadly prohibit the states from using their state law authority to address concerns, but rather established a system of dual regulation with collaboration between the FCC and state commissions.<sup>10</sup> Certainly, the FCC has the right under § 253(d) to preempt the enforcement of any state statute or rule that exceeds the authority granted the state in § 253(b) and serves to prohibit the ability of an entity to provide service. However, the statutes and rules in question, as discussed further below, are competitively neutral and do not prohibit the ability of any entity to provide service. Therefore, the statutes and rules that Vonage seeks relief from are within the savings clause established in § 253(b), and the

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<sup>9</sup> *In the Matter of Federal-State Joint Board on Universal Service* (Report to Congress) CC Docket No. 96-45, ¶¶89-90 (April 10, 1998)

<sup>10</sup> See 47 U.S.C. §§ 251(d)(3), 252(e)(3) and 253(b).

state's authority to regulate 911 and otherwise address public safety and consumer concerns under its historic police powers. Minnesota's rules and statutes should not be superseded or preempted. Any such preemption is particularly problematic in the absence of any action by the FCC to address these public safety concerns and protect consumers.

**i. State Statutes And Rules Addressing 911 Are In Furtherance Of The State's Right To Protect The Public Safety, And As Such Should Not Be Preempted By Federal Law.**

Vonage states on its website that it is "proud" to offer 911 emergency dialing. However, the 911 service offered by Vonage is inferior to that required under Minnesota law. In fact, the 911 service offered by Vonage poses serious public safety concerns.

It is worth noting as an initial matter that when Vonage began offering its service in Minnesota, it had no process in place to meet applicable state 911 requirements and its customers had no access to 911 services. Nor had Vonage sought any kind of waiver from applicable 911 requirements under Chapter 403 of the Minnesota Statutes.

Currently, Vonage is offering a type of 911 service that places the burden on the customer to "activate" 911 capability first before it may be used. For those customers who activate their 911 capability, Vonage routes their emergency calls to *non-emergency* numbers at Public Safety Answering Points ("PSAPs") whereas standard industry practice is to route 911 calls to emergency numbers via the 911 network.<sup>11</sup> As a result, Vonage callers must be able to

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<sup>11</sup> Vonage's web site at [http://www.vonage.com/features\\_911.php](http://www.vonage.com/features_911.php)

state their location and telephone number to the PSAP operator. PSAP operators have no access to Vonage callers' locations or other information.<sup>12</sup>

This "911" service offered by Vonage differs from traditional 911 service in important ways. First, callers are unable to dial 911 at all in the event the broadband connection is down. Second, Vonage's routing emergency calls to PSAPs presents public safety concerns because the Vonage 911 calls may not be answered as quickly as calls routed through the 911 network to emergency numbers at PSAPs.<sup>13</sup> Third, in the event that the Vonage caller becomes incapacitated during the call or is unable to give the PSAP operator the caller's location, the PSAP will be unable to dispatch a unit to assist the caller because the PSAP operator will not know the caller's location.<sup>14</sup> This could result in unnecessary death or the unnecessary escape of a criminal suspect.<sup>15</sup> Finally, recipients of Vonage 911 calls may not have been consulted or notified of the non-standard routing of calls outside its 911 network. These calls may be answered by untrained personnel who cannot properly respond at administrative centers, or the calls may even be met by an after-hours recording. These are some key differences between the "911" service provided by Vonage and the 911 service that consumers normally receive and have come to expect with their telephone service. Again, it is precisely because Vonage holds itself out as "phone service but better" that these concerns about consumers' expectations and safety must be addressed.

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<sup>12</sup> See attached Affidavit of St. Paul Police Sergeant Fred Fischer ("Fischer Affidavit") at pp. 2,3, ¶¶ 7, 11.

<sup>13</sup> Fischer Affidavit at pp. 2,3, ¶¶ 6, 9.

<sup>14</sup> See *id.* at p.3, ¶ 11.

<sup>15</sup> See *id.* at pp.3, 4, ¶11.

Vonage argues that Minnesota's 911 requirements are prohibitive. The OAG disagrees. Indeed, other VoIP carriers provide 911 services in compliance with the 911 requirements, including review by the 911 Board and approved by the MPUC. Vonage simply has not attempted to meet applicable state rules and statutes or request a variance. Minnesota law requires that carriers submit a 911 plan for meeting minimum technical and operational requirements. Minnesota Statutes § 403.06, subd. 2 further allows for carriers to apply for a waiver of all or portions of the 911 requirements. These statutes, while attempting to address the public safety in a meaningful way and prevent some of the problems that can result from insufficient 911 offerings, provide carriers some measure of flexibility and do not serve to prohibit a carrier from providing service. Service providers like Vonage are capable of either providing service in compliance with 911 requirements, or working with the Minnesota Department of Administration and MPUC to obtain a waiver or develop with an alternative plan. The State should not be preempted from enforcing critical 911 protections.

### **CONCLUSION**

For the reasons set forth herein, the OAG respectfully requests that the FCC postpone a decision on Vonage's request until after the FCC completes a generic proceeding regarding VoIP regulation.

In the event the FCC decides to make a determination in this docket before that time, the OAG respectfully requests that the FCC reject Vonage's contention that all state rules and regulations touching on VoIP services be preempted.

Dated: \_\_\_\_\_

Respectfully submitted,

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